No. 85-2083

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES M. JUDGE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA., *ET AL.*,
AND ITS AGENCIES AS THEIR INTERESTS MAY APPEAR,

Respondents.

JURISDICTIONAL STATEMENT OR IN THE ALTERNATIVE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

MOTION TO DISMISS, OR IN THE ALTERNATIVE, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a State Legislature violates the due process mandated by the Fourteenth Amendment to the United States Constitution when it repeals a statute passed for the benefit of a named individual without providing personal notice.

PARTIES

The Parties below are as stated in petitioner's jurisdictional statement except that Ella Gaines Yates has replaced Donald Haynes as the State Librarian of the Commonwealth of Virginia.

STATUTES INVOLVED

Chapter 8, Acts of Assembly, an Act to authorize the Chincoteague Toll Road and Bridge, Incorporated, to cross, maintain, and operate a public toll bridge and road across certain lowland, marshes and meadows in the county of Accomack, approved September 4, 1919, is reprinted at Appendix, 1a.

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Appellees/Respondents respectfully request that this Court dismiss the appeal on the grounds that the judgment does not present a substantial federal question and rests on an adequate non-federal basis. Further, appellees/respondents respectfully request that this Court deny the petition for writ of certiorari which seeks review of the judgment and opinion of the Supreme Court of the Commonwealth of Virginia.

STATEMENT OF THE CASE

The Statement of the Case by the petitioner is incomplete and partially incorrect.

The Commonwealth of Virginia is owner of the land claimed by the petitioner by virtue of the common law and has been since the securing of independence from England. In 1919, the General Assembly authorized a private company to construct a toll road and bridge on property which included that claimed by petitioner. (Chapter 8, Acts of Assembly, 1919 Extra Session). The interests

or rights acquired by that company in the road and bridge were transferred to the Commonwealth by recorded deed in 1930. In 1939-40, the Virginia Department of Highways and Transportation, an agency of the Commonwealth, replaced the old bridge and partially replaced the old road with a new approach road. The land claimed by the petitioner is that lying south of the new road, including the old road. The old road was transferred to the state's secondary road system and has since been maintained by the Commonwealth as part of that system. Sometime during the period following the construction of the new bridge, the Virginia Department of Highways, the Commission of Game and Inland Fisheries, and the County of Accomack, Virginia, built and maintained a public boat ramp on the land and have continued to maintain it to this day. The ramp and surrounding land were and continue to be used by the public for bathing, hunting, fishing and other public uses.

Sometime during the decade of the 1930's, numerous persons, including Sollie Johnson, Miles Hancock, and Harry M. Judge, petitioner's father, entered upon the land without actual title and erected improvements. Although this is one ground of petitioner's claim to the land, no part of the land was ever granted or patented by the Commonwealth to petitioner's father or to any of his predecessors in title and therefore petitioner's family cannot be said to have ever owned the land or purchased any meaningful title in it.

As noted in petitioner's Statement of the Case, his family first discovered that record title was in the Commonwealth in 1962. In 1964, the General Assembly passed a bill signifying a willingness to relinquish the Commonwealth's title in the land and authorizing and directing the State Librarian to draft and, with the approval of the Attorney General, convey a quitclaim deed to the land to the petitioner and his mother. (Chapter 510, Acts of Assembly, 1964, petitioner's Appendix 20a). Subsequently, and before the State Librarian had taken any action, it was discovered that the land described in Chapter 510 included the road and the public boat ramp and the General Assembly repealed the Act (Chapter 18, Acts of Assembly, 1964 Spec. Sess., petitioner's Appendix 21a).

Petitioner knew of the repeal as early as April 1965 but, although he no longer resided on the property, continued to pay

taxes on it until 1982 when his name was stricken from the county tax rolls.

The various proceedings in the Virginia courts and the United States District Court for the Eastern District of Virginia are as described in petitioner's Statement.

ARGUMENTS

I. The Judgment Below Rests on Determinative Issues Of State Law Which Have Been Settled By The State Courts.

Petitioner argues that he was entitled to notice because the repeal of Chapter 510 was a final determination of rights. His argument thus rises and falls on the question of whether he had any rights to be determined. Petitioner asserts a property interest in lands owned by the State and his claims have been fully litigated in the state courts. Petitioner asserted in the courts below but has not brought to this Court, the claim that Chapter 510 vested title in him and that its repeal was thus a deprivation of rights. However, the State trial court ruled that Chapter 510 was a gratuitous act by the General Assembly which required additional action by the State Librarian and the Attorney General before any rights would be vested in petitioner. At the time of the repeal of Chapter 510 by passage of Chapter 18, no conveyance had been made and, therefore, no rights had vested in petitioner.

The issue is not unlike the situation in the case of *United States* v. *Rowell,* 243 U.S. 464 (1917). In that case, Congress had authorized and directed the Secretary of the Interior to issue a patent in fee for certain lands to James F. Rowell. Before the patent could be issued, Congress repealed the authorizing legislation. This Court found that no property interest had vested in Mr. Rowell since the direction to the Secretary of the Interior showed that "a present statutory grant was not intended, but only such a grant as would result from the issue of a patent as directed." *Id.* at 469. The Court concluded that the action of Congress was not wanting in due process and that the repealing provision was valid.

The state courts below also found Chapter 18 to have been validly enacted. As this Court declared last year in *Walters* v.

National Association of Radiation Survivors, — U.S. —, 105 S. Ct. 3180 (1985), great deference must be paid to a "duly enacted and carefully considered decision of a coequal and representative branch of our Government." 105 S. Ct. at 3188. Further, "deference to congressional judgment must be afforded even though the claim is that a statute Congress has enacted effects a denial of procedural due process." *Id.* at 3189. As Congress is entitled to deference on a matter of federal law, so is the General Assembly of Virginia on a matter of State law.

Any other rights petitioner might assert to the land must stem from his family's residing on the land prior to the passage of Chapter 510 and its repeal would not have affected them. These rights were also fully litigated in the state courts.

As the rights asserted by the petitioner are property rights and depend on State law, the State court's findings on their validity is determinative.

II. The Want Of Actual Notice Was Not Constitutionally Infirm Since Recourse To The Courts Was Available To Prevent Abuse Of Substantive Rights.

Petitioner seeks to have this Court review a statute of the Virginia General Assembly passed in accordance with the rules adopted by that body to govern passage of legislation. The bill in question, Chapter 18 of the Virginia Acts of Assembly (Spec. Session 1964), does no more than repeal an earlier bill, Chapter 510 of the Acts of Assembly (1964), and does not adjudicate individual rights nor does it affect any rights which could have matured in the petitioner at the time of its passage. Chapter 510, by its language, did no more than direct the State Librarian to draft and, with the approval of the Attorney General, convey by deed land owned by the Commonwealth to petitioner. Even if, *arguendo,* petitioner ever had a cognizable property interest, due process has been afforded him since he has had an opportunity to be heard and to present his claim of entitlement to the property.

In *Cafeteria and Restaurant Workers Union, etc.* v. *McElroy,* 367 U.S. 886 (1961), this Court stated, "the very nature of due process negates any concept of inflexible procedures universally applicable to every situation. . . .[W]hat procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been

affected by government action." 367 U.S. at 895. As early as 1877, this Court has held that prior notice of tax assessments was not necessary when there was recourse to the courts to prevent abuse. *McMillen* v. *Anderson,* 95 U.S. 37, 41 (1877). In *Hancock, et al.* v. *Muskogee, et al.,* 250 U.S. 454 (1919), this Court again held in a tax assessment case that such an action "was an authorized exercise of the legislative power of the State, which according to repeated decisions of this Court, was not wanting in due process because of the mere fact that there was no previous notice to property owners or opportunity to be heard." 250 U.S. at 457. Again, the Court stated that recourse to the courts was the proper avenue for abuse of substantive rights. *Id.* at 457 (and cases cited).

III. This Appeal Is Barred By The Doctrine Of Laches.

In this case, petitioner knew of the passage of Chapter 18 within five months and could have sought some review of it at that time. Instead, he allowed the issue to lie dormant for almost two decades, did not himself reside on the property and allowed public use of it. Therefore, if for no other reason, the common law doctrine of laches should apply.

IV. Petition For Writ Of Certiorari To The Circuit Court Of Accomack County Has Not Been Timely Filed.

When the petition for writ of certiorari was initially filed on May 29, 1986, review was sought of the Judgment and Opinion of the Supreme Court of Virginia. When the Amended Petition for Writ of Certiorari was filed on June 18, 1986, review was sought of the Judgment of the Circuit Court of Accomack County, Virginia, a Judgment which was entered on May 9, 1985. Appellees/Respondents assert that the Petition for Writ of Certiorari to the Circuit Court of Accomack County, Virginia is improper and has not been timely filed; therefore, it should be denied. (See Rule 20.2 and 20.4 of the Rules of the United States Supreme Court.)

CONCLUSION

For the reasons stated above, appellees/respondents request that this Court dismiss the appeal or, in the alternative, that the petition for certiorari be denied.

Respectfully submitted,
COMMONWEALTH OF VIRGINIA AND
ELLA GAINES YATES

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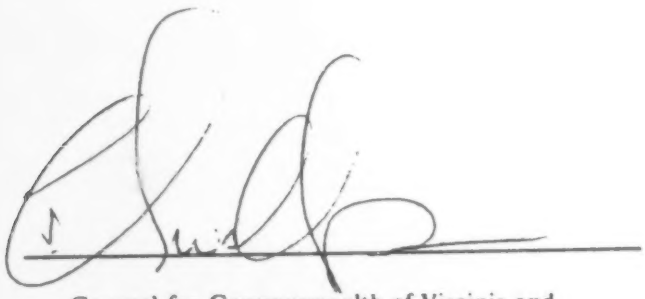
CERTIFICATE OF SERVICE

In accordance with Rule 28 of the Rules of the United States Supreme Court, we hereby certify that three copies of the foregoing Motion to Dismiss, or in the alternative, Brief in Opposition were mailed, postage prepaid, the 18th day of July, 1986, to Richard R. Nageotte, Esquire, Nageotte, Borinsky & Zelnick, 14980 Jefferson Davis Highway, Woodbridge, Virginia 22191-3997, counsel for petitioner.

By: 

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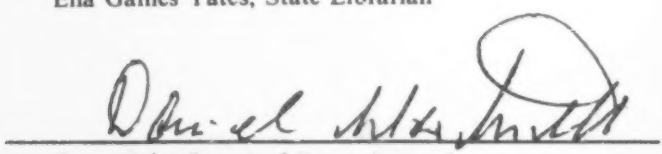
By: 

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APPENDIX

CHAPTER 8 — ACTS OF ASSEMBLY, EXTRA SESSION

CHAP. 8.—*An ACT to authorize the Chincoteague Toll Road and Bridge Company, Incorporated, to cross, maintain and operate a public toll bridge and road across certain lowlands, marshes and meadows in the County of Accomack.* [H B 12]

Approved September 4, 1919.

Whereas the Chincoteague Toll Road and Bridge Company, Incorporated, a corporation organized and existing under the laws of Virginia, is desirous of building and constructing a toll road and bridge, connecting the island of Chincoteague, in Accomack County, with the mainland of said county at a point on the farm of William Hickman, in Wallop's Neck, in said county, and,

Whereas said road will cross Chincoteague Marsh, Cockle Creek, Queen's Sound, and other lowlands, marshes and meadows and certain small creeks and streams, making up therein, lying between said Chincoteague Island and the mainland of said county, and

Whereas the title to such lowlands, marshes and meadows is in the State of Virginia, the same being ungranted and unpatented waste lands.

1. Be it enacted by the general assembly of Virginia, That the said Chincoteague Toll Road and Bridge Company, Incorporated, be, and the same is hereby, authorized and empowered to build, erect and construct, preserve and maintain, a toll road and bridge across Chincoteague Marsh, Cockle Creek, Queen's Sound, and any and all other lowlands, marshes and meadows, and the creeks, streams or streamlets intersecting the same, by whatever name or names said lowlands, marshes and meadows or said creeks, streams or streamlets are known, lying between Chincoteague Island, in Accomack County, and Atlantic Magisterial District, on the mainland in said county, and the said Chincoteague Toll Road and Bridge Company, Incorporated, is hereby given and granted any and all rights necessary and needful for the building and for the maintenance, preservation and repair thereof.

2. All acts and parts of acts in conflict herewith are hereby repealed.

3. The said Chincoteague Toll Road and Bridge Company, Incorporated, desiring to begin the construction of said toll road and bridge at once, an emergency is declared to exist and this act shall be in force from its passage.